Chinese American Planning Council, Inc. *and* Yu Chun Chiu *and* Hong Ning Workers Union. Cases 2–CA–24750 and 2–CA–25494

April 28, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On July 7, 1994, Administrative Law Judge Steven Davis issued the attached decision. The General Counsel and the Respondent filed exceptions, supporting briefs, and reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated the Act by refusing to increase employee Shao Paio Chen's regular hours of paid employment upon the expiration of Chen's participation in a subsidized employment program. We do not agree. Rather, we find that the Respondent violated the Act by imposing more onerous working conditions upon Chen.

In November 1989, the Respondent hired Chen as a handyman/porter at an apartment building. Chen worked 7 hours per day. The Respondent paid for 3 hours of employment. The money for the remaining 4 hours came from the Senior Aide Program, funded by the United States Department of Labor.

In May 1990, 4 days after Chen, a union supporter, testified at a Board representation hearing, the Respondent began to criticize Chen's work. Chen had, prior to his union activities, received good evaluations. In addition, the Respondent has admitted that in May 1990, and on several occasions thereafter, its supervisor and director of Phoenix Food Services threatened its kitchen staff employees with unspecified reprisals because of their support for the Union; and that in November 1990, the same supervisor physically attacked and assaulted a kitchen staff employee because of his support for and activities on behalf of the Union. We agree with the judge that this evidence supports a finding of antiunion animus.

The Senior Aide Program subsidized Chen's employment for the Respondent for 2 years. In October 1991, Chen was informed that his 2-year term with the Senior Aide Program would expire in December 1991, and he was offered a job by the Respondent as a telephone receptionist, which would have permitted Chen to maintain his 4 hours of employment in the Senior Aide Program and to continue in a 7-hour-per-day paid position. Chen, however, rejected that offer. In December 1991, Chen's eligibility for the Senior Aide Program expired and his subsidized employment ended. Chen continued to work 3 hours a day, for which the Respondent paid him.

Chen testified that although his hours were reduced from 7 to 3 per day, his job duties did not change and the Respondent required him to complete in 3 hours the same amount of work he had previously done in 7 hours. Chen also testified that the Respondent has criticized him because the building was not as clean as it had previously been.

By requiring Chen to maintain the same level of performance in 3 hours which he had previously managed in 7 hours, the Respondent is requiring him to do a job he does not have enough time to perform. The Respondent's criticism of him for failing to satisfy the Respondent's unreasonable expectations, coupled with the other evidence of animus, evidences a discriminatory motive. The imposition of more onerous working conditions in retaliation for union activities violates Section 8(a)(3). *Laminates Unlimited*, 292 NLRB 595, 599–600 (1989).

Contrary to our dissenting colleague, we do not agree that the General Counsel has established that the Respondent violated the Act by failing to increase Chen's paid hours to 7 hours a day. The Respondent's past practice has always been to pay a handyman/-porter for 3 hours per day, and to enroll that employee in the Senior Aide Program for an additional 4 hours a day. There is no evidence that the Respondent ever employed and paid a handyman/porter from its own funds for the total 7 hours per day. Further, the judge found that participants in the Senior Aide Program typically work for a fixed 2-year term, after which the worker is either hired and paid by the host agency or assigned to another Senior Aide position. The program is fundamentally a training program. Contrary to our dissenting colleague's assertion, there is no evidence that the Respondent had the authority to renew Chen's subsidized employment in the same position or that an employee can continue in the Senior Aide Program in the same position after the expiration of the 2-year term that allows for training.[2] Thus, in December 1991, Chen's paid hours were lawfully decreased be-

[1] The Respondent has excepted to some of the judge's credibility resolutions. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In recommending Chen for a full-time position *if one became available*, Chen's supervisor was not necessarily indicating that it would be available if outside funds were withdrawn.

cause of the expiration of his 2-year term in that position under the program.

Thereafter, the Respondent continued to employ and pay Chen for 3 hours out of its own funds as it had done for the previous 2 years; but as noted above it imposed predictably unmeetable obligations on him. Thus, although the General Counsel has established a violation of the Act—that the Respondent, for unlawful motives, subjected Chen to more onerous working conditions—the General Counsel has failed to establish that the Respondent would have placed Chen on its own payroll for 7 hours per day in the absence of his union activities.

Further, the General Counsel does not allege, and the judge did not find, that Chen in fact worked 7 hours a day and received only 3 hours' pay. Based on these facts, we believe that the appropriate remedy for the violation we find is the traditional cease-and-desist order. *Yale New Haven Hospital*, 309 NLRB 363, 371–372 (1992).

ORDER

The National Labor Relations Board orders that the Respondent, Chinese American Planning Council, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with unspecified reprisals because of their support for the Hong Ning Workers Union and activities on behalf of the Union.

(b) Physically attacking and assaulting employees because of their support for the Union and activities on behalf of the Union.

(c) Imposing more onerous working conditions on its employees by requiring them to do what was once a 7-hour job in 3 hours.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its office in New York City, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER BROWNING, dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(1) of the Act by its admitted conduct in threatening employees with unspecified reprisals and in physically attacking and assaulting employees because of their support for and activities on behalf of the Union. I also agree that the Respondent demonstrated animus against its employees' union activities by these actions, and that it demonstrated animus against the union support and activities of its employee Shao Paio Chen by criticizing his work and giving him poor evaluations after he testified at a Board representation hearing. Finally, I agree with my colleagues that the Respondent subsequently discriminated against Chen in violation of Section 8(a)(3) of the Act.

Where I part company with my colleagues is in their characterization of the unlawful discrimination which the Respondent visited upon Chen. I would adopt the judge's conclusion, largely for the reasons he articulated, that the Respondent violated Section 8(a)(3) by refusing to increase Chen's hours of paid employment, and, in agreement with the judge, I would order the Respondent to make Chen whole for any loss of earnings he suffered as a result of this unfair labor practice. The Respondent, for several years, had had a caretaker on the premises at the apartment building where Chen worked for 7 hours a day. It is true the Respondent had not always paid this caretaker for the full 7 hours of work, choosing to enroll in the Senior Aide Program to obtain payment for part of those hours. The fact remains, however, that, prior to Chen's union activities, the Respondent had always concluded that it needed a caretaker on the premises for 7 hours a day. And in fact, even after Chen began working for only 3 hours a day, the amount of work which the Respondent demanded of him did not change. In my view, this clearly evidences the fact that the Respondent still desired and needed a caretaker on those premises for the full 7 hours every day. In addition, Chen's supervisor recommended that he be considered for a full-time position if one became available when she evaluated Chen in April 1991. But instead of offering the job to Chen as a full-time position, or renewing his subsidized employment for the remaining 4 hours through the Senior Aide Program, which it had the authority to do, it chose to keep him on at only 3 hours per day. In agreement with my colleagues, I would conclude that the General Counsel has established a strong prima facie case that the Respondent made this choice because of Chen's union activities and support. Because the Respondent has proffered no rational rea-

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

son for having made the choice, it has not met its burden of proving that it would have made the choice even in the absence of Chen's union activities and support. Accordingly, I would conclude that the Respondent made the choice not to make Chen a full-time caretaker for unlawful discriminatory reasons in violation of Section 8(a)(3).

The question then remains whether we should order the Respondent to make Chen whole for making this discriminatory choice in violation of the law. An argument could be made that if the Respondent had kept Chen on, it would have done so by renewing his enrollment in the Senior Aide Program, and thus would not have paid him for the extra 4 hours per day in any event. In my view, however, it would not effectuate the purposes and policies of the Act to allow the Respondent to escape backpay liability for this reason. Having chosen not to renew Chen's participation in the Senior Aide Program, the only logical alternative the Respondent had in order to maintain its consistent past practice of having a caretaker on the premises for 7 hours a day would have been to put Chen on its payroll as a full-time caretaker. Because I would conclude that the Respondent violated the Act by failing to do so, and because I would resolve any doubts against the wrongdoer, I would order the Respondent to make him whole for the losses he suffered as a result.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten our employees with unspecified reprisals because of their support for the Hong Ning Workers Union and activities on behalf of the Union.

WE WILL NOT physically attack or assault our employees because of their support for the Union and activities on behalf of the Union.

WE WILL NOT impose more onerous working conditions on our employees by requiring them to do what was once a 7-hour job in 3 hours.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

CHINESE AMERICAN PLANNING COUNCIL, INC.

Terry A. Morgan, Esq., for the General Counsel.
Henry C. Woicik, Esq., of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge filed on November 8, 1990, in Case 2–CA–24570 by Yu Chun Chiu, an individual, and a charge filed on December 23, 1991, in Case 2–CA–25494 by the Hong Ning Workers Union (Union), a complaint was issued against Chinese American Planning Council, Inc. (Respondent) on May 27, 1993. The Respondent filed an answer, and on December 7 and 8, 1993, a hearing was held before me in New York City.

On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a not-for-profit corporation with an office and place of business in New York City, has been engaged in providing housing and other services to the Chinese-American community in New York City. Annually, Respondent derives gross revenues in excess of $500,000, and purchases materials, goods, and supplies valued in excess of $50,000, directly from suppliers located outside New York State. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Admitted Complaint Allegations*

In late 1989, the Union commenced organizational campaigns seeking to represent, in separate units, Respondent's kitchen staff employees, and its maintenance employees.

The complaint alleges, and Respondent admits, that beginning in about May 1990, and on several occasions in the summer of 1990, Respondent, through Albert Lau, its supervisor and director of Phoenix Food Services, threatened its kitchen staff employees with unspecified reprisals because of their support for the Union and activities on its behalf.

The complaint also alleges, and Respondent also admits, that on about November 5, 1990, Respondent, through Lau, physically attacked and assaulted a kitchen staff employee because of his support for the Union and activities on its behalf.

On February 8, 1991, the Union was certified by the Board as the collective-bargaining representative of Respondent's full-time and regular part-time kitchen staff employees, and on September 3, 1991, the Union was certified as the collective-bargaining representative of Respondent's full-time and regular part-time maintenance employees.

B. *The Disputed Complaint Allegation*

The complaint alleges, and Respondent admits, that in about late October 1991, and thereafter, Respondent failed

and refused to increase employee Shao Paio Chen's regular hours of paid employment for Respondent, even though Chen's working hours were reduced because of his removal from his position in the Senior Aide Program, effective December 15, 1991.

Although Respondent admits this allegation, it denies that it refused to increase Chen's hours of paid work because he engaged in activities on behalf of and in support of the Union, as alleged in the complaint.

III. THE FACTS

The United States Department of Labor has a subcontract with the National Council of Senior Citizens (NCSC) to provide training and employment for older Americans. Respondent is a local sponsor of the NCSC. Respondent conducts programs for senior citizens in the Chinese-American community which include the Mature Workers Program, and the Senior Aides Program.

The Mature Workers Program trains older people in job skills. The Senior Aides Program help finds work at host agencies for senior citizens. Participants work for the agency for a 2-year period. At the end of their term, the worker is either hired by the host agency, as a regular employee, or given another senior aide position in order to obtain more experience. The work performed is designed to train the employee to adapt to the American workplace. The host agency does not pay for the work performed by the senior aide. Payment for the work of the senior aide is made by NCSC through the Department of Labor with Government funds.

Chen completed the handyman training course given by the Mature Workers Program. In November 1989, he became employed by Respondent, a host agency, as a handyman/-porter at 384 Grand Street, New York City, a building which was operated by the 384 Grand Street Housing Development Fund Company. This was his first job in the United States.

Chen was employed for 7 hours per day, 3 hours of which were paid for by the 384 Grand Street Housing Development Fund Company, and 4 hours were paid by the Senior Aide Program, funded by the Department of Labor. He received two separate checks. When he was hired, he was told that Respondent could not, itself, afford a full-time employee.

When Chen was hired, he was told that this was a 7-hour-per-day job. From November 1989 through December 1991, Chen worked 7 hours per day, 35 hours per week at the building, which consists of 26 residential apartments and 3 retail stores. His duties included cleaning the interior and exterior of the building and repair and maintenance work in the apartments and stores.

In about late 1989, the Union began organizing Respondent's employees. On January 24, 1990, Chen signed an authorization card for the Union.

Chen stated that in early February 1990, Echo Wong, Respondent's building manager for 384 Grand Street, asked him what he thought of the Union. Chen told her that he believed that the Union would benefit the employees and that he had joined it.

Thereafter, on February 16, 1990, at the end of his 3-month probationary period, Chen received a positive, written evaluation from Wong, which described him as being very reliable and hard working. She recommended that he be on probation for a further 3 months, during which time he receive training at a superintendent training course.

On April 2, Chen received another evaluation from Wong, in which she stated that following the training course, his work performance and quality have ''highly improved.'' She described him again as hard working, and stated that he ''has a very good knowledge on building maintenance, but he needs more hands-on experience to strengthen his skills.'' She recommended that he be considered for a full-time building maintenance position, if one became available, and noted that in the future, if the budget permits, he should receive a salary increase.

On May 10, Chen testified at a Board representation hearing. Supervisor Tammy To, who is Wong's supervisor, was present at the hearing.

On May 14, Chen received a memo from Wong, in which she criticized him for failing to report to the building manager at least once per day regarding the progress of repair work, and any difficulties which may arise. Chen first testified that he was required to make the report in English, which is not his native language. He later, however, stated that he was occasionally required to complete the reports in Chinese, and there was ''no strict rule'' as to whether he had to complete the reports in English. Chen stated that prior to May 14, he was not required to make a daily report, and in fact none of Respondent's handymen are required to complete such a report. Chen further stated that he was able to write only certain phrases in Chinese. Wong rejected his Chinese reports, saying that she was unable to read his Chinese. She then asked him to write the reports in English.

On July 6, Chen received another memo from Wong, in which she noted that he had taken over 2 months to make certain repairs, thereby disregarding a ''service priority list.''

In early August, Chen received four memos in 3 days, and one other 4 days later. The memos noted that Respondent received a violation for garbage in the hallway, and that he should have removed it or told the tenant who left it to do so; Chen failed to keep the elevator's lock in a position so that entry to the basement cannot be made by outsiders, and that she saw him sleeping in the basement on August 8; Chen failed to check the work of outside contractors such as exterminators and fire extinguisher servicemen; Chen left a large plumbing part in the lobby, ignoring instructions that it should be taken to another building owned by Respondent. The last of the above memos was written on August 13.

Chen sent a letter to Wong on August 13, protesting the ''mental pressure'' he was subjected to, including the requirement that he write his reports in English, and the fact that his workload has increased.

On August 14, the Union wrote to Respondent's official Lau, protesting the ''continuing illegal harassment faced by workers at . . . 384 Grand Street.'' The Union demanded that the ''intimidation'' and retaliation against the employees for their union activities stop.

On October 10, 1990, Wong sent another memo to Chen demanding that certain personal articles, including a television and disc player, be removed from the basement.

Respondent admitted that in November 1990, its official, Lau physically attacked and assaulted a kitchen employee because of his support for the Union and activity on its behalf.

Chen testified that prior to his testimony at the representation hearing in May, he had never been given a written memo from Wong. Wong testified that no one at Respondent's other building at 50 Norfolk Street is required to make

daily written reports because they are doing their jobs and are reporting properly. She stated that Chen failed to report orally each day, so that written reports were required.

As set forth above, 1 year later, in September 1991, the Union was certified as the collective-bargaining representative of the maintenance employees. Chen was a member of that unit, and served as its secretary in collective-bargaining negotiations with Respondent.

During the bargaining, Respondent's representatives informed Chen that Respondent could not afford to hire a full-time permanent maintenance employee, and that his work could be completed in a 5-hour workday, and thus only a part-time employee was needed in his position.

In October 1991, Chen was informed that his 2-year term as a senior aide would expire in December. He was offered a job by Respondent as a telephone receptionist which would have preserved his hours of employment in the Senior Aide Program, but he rejected the offer.

In December 1991, Chen's senior aide position was terminated, and accordingly he no longer worked the 4 hours per day which was paid for by the Senior Aide Program. However, he retained, and continued to be employed at, and paid for, his 3-hour-per-day job as a handyman/porter at 384 Grand Street.

Chen's job duties remained the same. Respondent has not hired anyone to assist him, and he remains the sole handyman/porter at 384 Grand Street. No senior aide has been hired to work at the building as a replacement for Chen's senior aide position which expired. This, notwithstanding that last year, Respondent requested funding for 100 senior aide positions, and received 92 or 93, and this year, it requested 100 positions.

Mannam Ma, the director of the Senior Aide and Mature Workers Program, testified that senior aides are no longer being trained in building maintenance because of the downturn in the real estate industry. Currently, they are trained in home care.

Chen testified that, notwithstanding the fewer hours he works at the building, he still has the same amount of work to perform, and that he strives to complete 7 hours' work in 3. He stated that he does not have enough time to complete all his assignments, and the building is not as clean as it was before, adding that he was criticized in February 1993 by Wong for not keeping the building clean.

He performs his work at the same pace as before the reduction in hours, and copes with the reduced hours by reducing and postponing the work ''step by step.''

Prior to Chen's hire on November 1, 1989, two porter/-handymen were successively employed at the building. Man Leung, who worked from June 1 to October 2, 1989, for 7 hours per day, was employed on the same basis as Chen: his work was partly funded by the Senior Aide Program; and Cho-Tong Chu, who worked from October 2 to 31, 1989. The record is unclear as to whether Chu was a participant in the Senior Aide Program. It should be noted that prior to Man Leung's employment in June 1989, for about 3 months the superintendent of 50 Norfolk Street performed repairs and maintenance at 384 Grand Street, and at the same time a Mr. Liang did the handyman/porter work at 384 Grand Street. There was no evidence as to how many hours Liang worked at the building. In addition there was 1 month where no one was employed as a porter/handyman.

Respondent's Evidence

Respondent first argues that no animus has been demonstrated since following Chen's admission to Supervisor Wong that he joined the Union and believed that the employees would benefit therefrom, he nevertheless received a very positive evaluation only 1 or 2 weeks later, and another excellent evaluation 1-1/2 months after that, in April 1990. Respondent further argues that the absence of animus is shown in its offer to Chen of another senior aide position when his expired.

Respondent argues that the substance of the complaint was addressed, and dismissed, by the Regional Director. On June 16, 1993, the Regional Director dismissed that part of the instant charge which alleged that Respondent removed Chen from his senior aide position because of his union activities. In dismissing that part of the charge, the director found that Chen's participation in the senior aide program was lawfully limited to 2 years.

Wong testified that when Chen's senior aide position expired, Respondent did not hire another senior aide to assist Chen because she was told by Supervisor To that there were not enough senior aides available, and that if one was hired, she would have to supervise the senior aide. According to Wong, she was too busy at that time to supervise a senior aide.

Respondent further asserts that when Chen's senior aide position expired, it did not increase his hours because it could not afford to do so, and additional hours were unnecessary because it determined that the work could be performed in the 3 hours per day he was paid by Respondent for his work.

In addition, Respondent asserts that Chen has not performed competently, and supports that conclusion with five work orders from October 1990 to November 1993, bearing notations that he was unable to clear clogged drains, find a leak, and fix a short circuit in a circuit breaker. In these instances, Wong either had the porter/handyman at 50 Norfolk Street make the repair or hired an outside contractor. In one instance, the repair required welding a pipe using a blowtorch.

Positions of the Parties

General Counsel argues that Respondent discriminatorily refused to increase Chen's work hours following the expiration of his participation in the Senior Aide Program. General Counsel's argument is that Chen's hours were not increased because of his union activities. This action imposed more onerous working conditions on him, according to General Counsel, since he was required to perform the same amount of work in 3 hours that he had previously performed in 7 hours.

General Counsel points to the facts that (a) for over 2 years, a porter/handyman was employed for 7 hours per day to perform the duties at the building, (b) Chen had excellent job evaluations until his testimony at the Board representation hearing, and (c) Respondent has refused to hire another senior aide to assist Chen, although it could have done so.

Respondent argues that General Counsel's case is simply a reargument of that part of the charge which had been dismissed by the Regional Director. It was found that the reduc-

tion in Chen's hours, by the expiration of his participation in the Senior Aide Program, was not unlawful.

Respondent thus argues that since a reduction in Chen's hours was not unlawful, a refusal to increase his hours cannot be unlawful.

Analysis and Discussion

General Counsel's prima facie case

Chen's interest in the Union was well known to Respondent. He admitted to his supervisor that he joined the Union, and that he believed that employees would benefit therefrom. Despite the two excellent evaluations he received within the next 2 months, a change was apparent in Respondent's attitude upon his testifying at a Board proceeding on May 10, 1990.

Only 4 days later, he began receiving memos criticizing his work and his failure to report each day, and requiring that he make daily written reports in English, not required to be made by any other employee, and in a language other than his native language.

This criticism of Chen's work began only 1 month after Supervisor Wong wrote that he had a ''very good knowledge'' of building maintenance.

These criticisms of Chen, which began in May, and continued through the summer of 1990, occurred contemporaneously with Respondent's admitted threats of unspecified reprisals to its kitchen staff employees because of their support for and activities on behalf of the Union.

Although those threats were made to employees in a separate unit in a different building, I find that there is a connection between that animus and animus directed toward Chen. Thus, the Union's organizational campaign began in late 1989 and was directed at both units at the same time. Chen testified at a Board proceeding, and he told Supervisor Wong that he joined the Union and believed that it would benefit the workers. It is apparent that Respondent possessed animus toward the Union and toward employees who supported it.

I would have found that Respondent's change in attitude toward Chen's work performance, its criticisms of him, and the requirement that he write reports in English constituted violations of the Act. Those actions, however, were not alleged, apparently because they would have been time barred by Section 10(b) of the Act. Nevertheless, I may use such incidents as background to support a finding of union animus, and I do here. *Gencorp*, 294 NLRB 717 fn. 1 (1989).

The fact that the Regional Director determined that Chen's hours were lawfully decreased by the expiration of his term as a senior aide does not answer the question presented here.

The question posed by the complaint is whether Chen's hours should have been increased upon the termination of his participation in the Senior Aide Program. Specifically, whether his hours should have been increased from the 3 hours within which Chen was supposed to complete the work which had taken him 7 hours previously.

In deciding whether Chen's work hours should have been increased to 7 upon the loss of his senior aide position, it is critical to examine the history of the building maintenance staff's work hours in order to determine whether Respondent's practice was to employ a handyman/porter for 7 hours per day. I find it most significant that prior to Chen's hire, Man Leung, employed for 4 months in the same position, worked 7 hours. Chen worked for 2 years at 7 hours per day. In addition, Chen gave uncontradicted testimony that upon his hire he was told by Supervisor Wong that his was a 7-hour job. Further, Chen's April evaluation recommended that he would be a ''potential candidate'' for a full-time building maintenance position should one become available, and that he should receive a salary raise if the budget permitted.

It is therefore clear that Respondent's failure to increase Chen's hours to 7 per day was at variance with its prior practice of employing a handyman/porter to work 7 hours per day. *Nemacolin Country Club*, 291 NLRB 456, 461 (1988).

I accordingly find that General Counsel has established a prima facie showing that the union activities of Chen were motivating factors in Respondent's refusal to increase his work hours. *Wright Line*, 251 NLRB 1083 (1980).

Having found a prima facie for unlawful motivation in the refusal to increase Chen's work hours, the burden shifts to Respondent to prove that it would have taken the same action even in the absence of his union activities. *Wright Line*, supra.

Respondent asserts several reasons for its refusal to increase Chen's work hours. First it asserts that it could not afford to do so. No financial evidence was given at hearing as to this defense, and it therefore has not been proven. *Advertiser's Mfg. Co*., 280 NLRB 1185, 1197 (1986).

Respondent further asserts that it was not necessary to increase Chen's hours since he could have finished his work in 3 hours. However, Chen and the handyman/porter employed before him were employed for 7 hours, and according to Chen's credited testimony, Respondent said the job could be done in 5 hours per day.

Respondent further argues that it did not hire an additional senior aide to assist Chen because none were available. This does not ring true especially since nearly 100 senior aides were funded last year, and it requested 100 positions this year. In this connection, it was asserted that even if a senior aide was assigned to the building, Supervisor Wong did not have the time to train him. There was no evidence of a change in her responsibilities which would have prevented her from training a new handyman/porter.

Finally, Respondent asserts that Chen did not properly perform his job. It is strange that in April 1990, after only 4 months of employment, he received an excellent performance evaluation with a recommendation that he be considered for a full-time position and a pay raise, since he had ''a very good knowledge'' of building maintenance, but thereafter, his skills were not considered passable.

It should also be noted that inasmuch as Leung worked 7 hours, and thereafter Chen worked 7 hours for 2 years, there has been no showing that any conditions in the building changed which would have required a reduction in Chen's hours of work. There can be no showing here that business declined. The apartments remained occupied, and there continued to be 7 hours' work to be performed. In fact, he was criticized in February 1993 for not keeping the building clean.

The fact that Chen was offered a clerical job elsewhere does not help Respondent. By leaving his position at 384 Grand Street, Chen would be removing himself from his position as secretary for the Union in its bargaining with Respondent.

For the above reasons, I find and conclude that Respondent has not met its burden of proving that it would have not increased Chen's hours in the absence of his union activities. *Wright Line*, supra.

CONCLUSIONS OF LAW

1. Chinese American Planning Council, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Hong Ning Workers Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening its kitchen staff employees with unspecified reprisals because of their support for the Union and activities on behalf of the Union, Respondent violated Section 8(a)(1) of the Act.

4. By physically attacking and assaulting a kitchen staff employee because of his support for the Union and activities on behalf of the Union, Respondent violated Section 8(a)(1) of the Act.

5. By failing and refusing, from December 15, 1991, upon the expiration of his participation in the Senior Aide Program, to increase the regular hours of paid employment of Shao Paio Chen, to 35 hours per week, Respondent violated Section 8(a)(3) and (1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent make whole Shao Paio Chen for any losses of earnings he may have suffered as a result of Respondent's having unlawfully failed and refused to increase his working hours to 35 hours per week, from December 15, 1991, when his participation in the Senior Aide Program ceased, to be computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]